Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri in Eugene W. Osment, Respondent, v. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants, is reported in 159 S. W. (2d) 666, (not yet officially reported).

II.

STATEMENT AS TO JURISDICTION.

The judgment of the Supreme Court of the State of Missouri determined rights claimed by the petitioner

under the Federal Employers' Liability Act as amended August 11, 1939. (45 U. S. C. A., Sec. 51; 53 Stat. 1404). Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344 and particularly Sec. 344B thereof).

A full statement of the statutes and decisions relied on as a basis of jurisdiction herein and the nature of the case are fully set out under the heading II in the Petition for Writ of Certiorari herein, and will not be repeated at this point.

III.

STATEMENT OF THE CASE.

Petitioner has made a statement of the case under the heading "I" in the Petition for Writ of Certiorari, and will not unduly prolong this brief by repeating it herein, but refers the Court to the statement therein made.

IV.

SPECIFICATIONS OF ERROR.

(1) The Court erred in holding that petitioner could not recover under the Federal Employers' Liability Act for the negligence of respondents in "knowingly retaining in its employ one who was dangerous to others by reason of habitually misconducting himself outside the scope of his employment in a manner dangerous to others", solely because the act of the employee causing the injury was outside the scope of his employment, even though the negligence of the company in retaining said employee placed petitioner in a position where it might reasonably be anticipated that harm would come to him.

(2) The Court erred in construeing the language used in the Federal Employers' Liability Act, "negligence

of any of the officers, agents or employees", as too restricted "to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein."

(3) The Court erred in failing to construe the word "negligence" as used in the Federal Employers' Liability Act, "liberally to fulfill the purposes for which it was enacted", so that, "the word may be read to include all the meanings given it by the courts".

(4) The Court erred in holding that the failure of the company policeman, or special officer, Finnell, to act to avoid petitioner's injuries created no basis of recovery even though he was charged with a duty of so acting and had the time and present means and ability to act to prevent the injury.

(5) The Court erred in holding that under the Federal Employers' Liability Act there could be no breach of duty or liability on the part of respondents for the failure of the special officer, Finnell, to act to prevent the injury to Osment, even though Finnell and the company knew that Stalac was "dangerous to others", solely because it held that under the Federal Act respondents were not liable for knowingly retaining in their service "one who was dangerous to others", by reason of acts on respondents' premises outside the scope of his employment.

(6) The Court erred in holding that under the Federal Employers' Liability Act there can be no recovery for the failure of a carrier to perform a duty to its employees which it considered necessary and voluntarily assumed and created a special department for such purpose.

SUMMARY OF ARGUMENT.

I.

The master is under a duty to exercise reasonable care not to employ or retain in its service servants known to misconduct themselves on its premises outside the scope of their employment in a manner dangerous to other employees, and is "negligent in knowingly retaining in its employ one who is dangerous to others by reason of his habit of misconducting himself in a manner dangerous to others". Such liability is not based upon the scope of employment of the servant causing the injury nor of the specific act of such employee, but on the failure of his employer to exercise reasonable care in retaining him where it could reasonably anticipate danger to other employees if he were retained. Such theory of liability should be applied for such conduct of such employer to cases under the Federal Employers' Liability Act because under such act there is a duty to employ and retain only fit and competent servants. The term "negligence" in the Act is to be liberally construed to include all the meanings given the word negligence by courts. The language of the Act is, "negligence of any officers, agents, or employees", and this is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein, and petitioner was in the scope of persons intended to be protected by the Act.

Restatement of the Law, Torts, Section 317.

Ruling Case Law, Vol. 4, Sec. 650.

Sherman and Redfield on Negligence, Revised Edition, Vol. 1 Sec. 160 page 361 and Vol. 2, Sec. 199, pages 456-459.

Dean v. *St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54.

Zabawa v. *Oberbeck,* 146 Wisc. 621, 131 N. W. 826.

Barrentine v. *Henry Wrape Co.,* 105 Ark. 485, 152 S. W. 158.

Henry Wrape Co. v. *Barrentine,* 138 Ark. 267, 211 S. W. 366.

M., K. & T. Ry. Co. v. *Day,* 104 Tex. 237, 136 S. W. 435.

Waldo v. *Galveston, etc. Co.,* (Tex.), 50 S. W. (2d) 274.

Galveston, etc. Ry. Co. v. *Waldo,* (Tex.), 77 S. W. (2d) 326.

Swinanton v. *LeBoutiler,* 28 N. Y. 553, 148 N. Y. 752.

Neustiehl v. *Freedman,* 153 N. Y. S. 120.

Blaisdell v. *L. I. Ry. Co.,* 136 N. Y. S. 760.

Davis v. *Merrill,* 133 Va. 69, 112 S. E. 628.

Yazoo and Midland Valley R. Co. v. *Hare,* 104 Miss. 564, 61 So. 648.

Hagel v. *H. H. Franklin Co.,* 199 N. Y. 388, 92 N. E. 794.

Palmer v. *Keene,* 80 N. H. 68, 112 Atl. 798.

Rofsky v. *City,* 12 N. Y. S. (2d) 560.

Isaacs v. *Smith,* (Mo. App.), 275 S. W. 555.

Allen v. *Quercus Lumber Co.,* 171 Mo. App. 492, 157 S. W. 661.

Williams v. *M. P. R. Co.,* 109 Mo. 475, 18 S. W. 1098.

Fletcher v. *B. & P. R. Co.,* 168 U. S. 135, 18 S. C. R. 35, l. c. 37.

Blain v. *Hattig, etc. Co.,* 232 Mo. App. 870, 105 S. W. (2d) 946.

Stuart v. *K. C.,* 102 Kan. 307.

White v. *K. C. Stock Yards,* 104 Kan. 90.

Federal Employers' Liability Act, Title 45 U. S. C. A., Sec. 51, 53 Stat. 1404.

Jamison v. *Encarnacion*, 281 U. S. 635, 50 Sup. Ct. 440.

B. & P. R. Co. v. *Jones*, 95 U. S. 439, l. c. 441, 442.

Charnock v. *T. & P. Ry. Co.*, 194 U. S. 432, 24 Sup. Ct. 671, l. c. 672.

Lloyd v. *Alton R. Co.*, (Mo.), 159 S. W. (2d) 267.

DeAtley v. *C. & O. Ry. Co.*, 201 Fed. 591.

McDuff v. *Kurn*, (Ala.), 172 So. 886.

Smithson v. *A. T. & S. F. Ry. Co.*, 174 Cal. 148, 162 Pac. 111, 113.

Crawford v. *Davis*, 136 S. C. 95, 134 S. E. 247, 251.

Morris v. *M. P. Ry. Co.*, 107 Neb. 788, 187 N. W. 130.

Corpus Juris, Vol. 39, page 266.

Roberts, Federal Liability of Carriers, page 1545.

Minn., etc. Ry. Co. v. *Rock*, 279 U. S. 410, 49 Sup. Ct. 363, 365.

Griffin v. *B. & O. R. Co.*, 96 W. Va. 302, 122 S. E. 912.

II.

The respondents had a common law duty not to retain employees dangerous to others and to so control their servants acting outside the scope of their employment as to prevent an unreasonable risk of bodily harm to other servants engaged in their duties for respondents. Finnell was a patrolman engaged in the course of his duties for the Special Service Department and charged with the duty of controlling the conduct of servants and protecting them from injury or unreasonable risk of injury through the misconduct of other servants. He was within 2 to 5 feet of petitioner at the time Stalac walked up behind petitioner and seized him and Finnell had time and

the means and ability to prevent the seizure or the injury, and yet failed to act and such failure constitutes negligence for which the company is liable.

Regardless of any common law duty to retain only competent servants or to control their conduct, respondents considered it necessary and had assumed such duty by organizing the Special Service Department and placing upon it the duties of controlling the conduct of its servants and protecting its servants from bodily injury through any unlawful or excessive violence on the part of other employees. Finnell was a special officer charged with performing the duties thus assumed and his failure to prevent the seizure and injury to petitioner when he was present with the means and ability to do so constitutes negligence.

Sherman and Redfield on Negligence, Vol. 1, Sec. 8.

Lambert v. *Jones*, (Mo.), 98 S. W. (2d) 752, l. c. 756.

Barber v. *Kellogg*, 339 Mo. 677, 123 S. W. (2d) 100.

Frisco v. *Mills*, 271 U. S. 344, 46 Sup. Ct. 520.

Washington T. Co. v. *Callahan*, 276 F. 334.

Matthison v. *Payne*, 98 N. J. Law 87, 118 Atl. 771.

Tapore v. *Boston M. R. Co.*, 78 N. H. 536.

Brock v. *Mobile R. Co.*, 336 Mo. 918, 51 S. W. (2d) 100, Cert. Den. 53 Sup. Ct. 87, 287 U. S. 638.

Thom v. *N. Pac. R. R. Co.*, 190 Minn. 622, 252 N. W. 660.

Ross v. *L. & N. R. Co.*, 178 Miss. 69, 172 So. 752.

Seaboard Airline Ry. Co. v. *Latham*, 23 Ala. App. 490, 127 So. 679.

Simmons v. *Louisiana Railroad Co.*, 149 La. 686, 90 So. 24.

Stool v. *Southern Pacific,* 88 Or. 350, 172 Pac. 101.

Newkirk v. *Pryor,* (K. C. App.), 183 S. W. 682.

Evans v. *Santa Fe,* 345 Mo. 147, 131 S. W. (2d) 604.

Jenkins v. *Kurn,* 313 U. S. 256, 85 L. Ed. 851.

VI.

ARGUMENT.

I.

Negligence in Retaining Stalac.

Under the common law, "a master is under a duty to exercise reasonable care to so control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them", where the servant, "is upon the master's premises or upon premises which the servant is privileged to enter only as a servant", and the master, "knows or has reason to know, of the necessity and opportunity for exercising such control." "The master may subject himself to liability * * * by retaining in his employment servants, who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others * * *."

This statement of a master's duty is clearly and succinctly set out in Restatement of the Law, Torts, Section 317. See also 4 R. C. L., Section 650; Sherman and Redfield on Negligence, Revised Edition, Vol. 1, Section 160, page 361 and Vol. 2, Section 199, pages 456-459. The rule thus stated has been applied by the courts on numerous occasions. *Dean* v. *St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54; *Zabawa* v. *Overbeck*, 146 Wisc. 621, 131 N. W. 826; *Barrentine* v. *Henry Wrape Co.*, 105 Ark. 485, 152 S. W. 158; *Henry Wrape Co.* v. *Barrentine*, 138 Ark. 267, 211 S. W. 366; *M., K. & T. Ry. Co.* v. *Day*, 104 Tex. 237, 136 S. W. 435; *Waldo* v.

Galveston, etc. Co., (Tex.), 50 S. W. (2d) 274; *Galveston, etc. Ry. Co.* v. *Waldo*, (Tex.), 77 S. W. (2d) 326; *Swinanton* v. *LeBoutiler*, 28 N. Y. 553, 148 N. Y. 752; *Nenstiehl* v. *Freedman*, 153 N. Y. S. 120; *Blaisdell* v. *L. I. Ry. Co.*, 136 N. Y. S. 760; *Davis* v. *Merrill*, 173 Va. 69, 112 S. E. 628; *Yazoo and Midland Valley R. Co.* v. *Hare*, 104 Miss. 564, 61 So. 648; *Hagel* v. *H. H. Franklin Co.*, 199 N. Y. 388, 92 N. E. 794; *Palmer* v. *Keene*, 80 N. H. 68, 112 Atl. 798; *Rofsky* v. *City*, 12 N. Y. S. (2d) 560; *Isaacs* v. *Smith*, (Mo. App.), 275 S. W. 555; *Allen* v. *Quercus Lumber Co.*, 171 Mo. App. 492, 157 S. W. 661; *Williams* v. *M. P. R. Co.*, 109 Mo. 475, 18 S. W. 1098.

The Missouri court in its opinion concedes that this is the law, and concedes that the facts within the present case are sufficient to make a case under the rule therein propounded.

The Missouri court in its opinion concedes that "The federal courts might recognize the plaintiff's theory of liability and construe the conduct complained of as being negligence * * *" (R. 512). The federal courts not only "might" construe the conduct complained of as being negligence, but in the case of *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135, 18 S. C. R. 35, this Court adopts the rule herein set out as to the liability of a railroad to third persons for the unauthorized conduct of employees riding upon its trains. In so holding, the Court said, l. c. 37:

> "*It is not a question of scope of employment, or that the act of the individual is performed by one who has ceased, for the time being, to be in the employment of the company.* The question is, does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act

which might reasonably be called dangerous, and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented? *We think the company does owe such a duty, and if, through and in consequence of its neglect of that duty, an act is performed by a passenger or employee which is one of a series of the same kind of acts, and which the company had knowledge of, and had acquiesced in, and if the act be, in its nature, a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable.*" (Italics ours).

It goes without argument that the injury to Osment could have been reasonably anticipated, and could have been prevented merely by not keeping Stalac in the service.

It is clear from the above quotation that this Court recognizes the liability of a master for failing to prevent or control unauthorized conduct of his servant outside the scope of his employment where the employer could reasonably foresee or anticipate the danger.

Had the petitioner been under the state Workmen's Compensation Law he would have been entitled to recover even though Stalac's act was outside the scope of his employment. The courts hold that "If an employee whose predilection for playing pranks, which are likely to result in injury to his fellow employee, is knowingly kept in the employ of the master, the danger of injury becomes an incident of the employment and the injured employee may recover under the Workmen's Compensation Law." *Blain* v. *Huttig, etc. Co.*, 232 Mo. App. 870, 105 S. W. (2d) 946; *Stuart* v. *K. C.*, 102 Kan. 307; *White* v. *K. C. Stock Yards*, 104 Kan. 90. The Federal Act, like State compensation acts, is to be liberally construed.

The Missouri court concedes that the petitioner would be entitled to recover at common law. He would have been entitled to recover under the decisions of this Court had he been an invitee or one lawfully on the premises. He would have been entitled to recover had he been under the Workmen's Compensation Act. *The sole reason he was denied recovery was because he was under the Federal Act which was his exclusive remedy.* The Missouri court denies recovery under such act solely because it says that this Court, "Has refused to impose liability on employees for acts of employees when outside the scope of their employment." This holding ignores the fact that petitioner did not seek to hold respondents on the theory that the specific act of Stalac was their act.

The opinions liken the theory of liability for retaining a dangerous employee to liability in harboring a vicious dog or other animal or maintaining a pitfall. In *Dean* v. *St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54, l. c. 55, the Court says: "It (defendant) had no more right therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog or other animal, or to permit a pitfall or trap * * *." This is in accord with, Restatement of the Law, Torts, Sec. 317, and other authorities, *supra.*

The pertinent parts of the Federal Employers' Liability Act, Title 45, U. S. C. A., Sec. 51, 53 Stat. 1404, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of

any of the officers, agents or employees of such carrier * * *."

It will be noted that the act used the words "negligence of *any* of the officers, agents or employees of such carrier." It does not restrict it to a fellow servant or an officer, agent or employee personally inflicting the injury. The term "negligence" is not defined. Leading opinions of this Court have set out the construction to be given the word, however. This Court in *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, has said:

> "The act is not to be narrowed by refined reasoning or for the sake of giving negligence a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to the end that *the word may be read to include all the meanings given to it by courts* and within the word as ordinarily used * * * negligence is a word of broad significance and may not readily be defined with accuracy." (Italics ours).

The liberality of the purpose of the Act is further shown by the Amendment of 1939.

Negligence under such Act was defined by the Supreme Court of the United States in *B. & P. R. R. Co.* v. *Jones*, 95 U. S. 439, as follows, l. c. 441, 442:

> "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what a person under the existing circumstances would not have done. *The essence of the fault may lie in omission or commission.* The duty is dictated and measured by the exigencies of the case." (Italics ours).

In *Charnock* v. *T. & P. Ry. Co.*, 194 U. S. 432, 24 Sup. Ct. 671, the Supreme Court defines negligence under the federal act as follows, l. c. 672:

> "Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances."

In *Lloyd* v. *Alton R. Co.*, (Mo.), 159 S. W. (2d) 267, an action under the Federal Employers' Liability Act, the Missouri court has set out a remarkable definition of negligence under the act:

> " 'If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure so to do is negligence. That the danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care. One who crosses a railroad track may not reasonably anticipate that a train will in fact be met, but, by reason of the risk that one may be, he is called upon to do what is reasonably required to find out. * * * While "the likelihood or unlikelihood of a future happening is the turning point" as the test of duty to anticipate * * *, this does not mean that the chances in favor of the happening must exceed those against it. The test is not of the balance of probability, *but of the existence of some probability of sufficient moment to induce action to avoid it on the part of the reasonable mind.* * * * If there was likelihood of injury, the duty to use care was not discharged merely because there was greater unlikelihood of it.' *Tullgren* v. *Amoskeag Mfg. Co.*, 82 N. H. 268, 276, 277, 133 A. 4, 8, 9, 46 A. L. R. 380." (Italics ours).

Courts and text writers is construing the Act have said, "The language used is 'any officers, agents or employees' *and this is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein.*" *DeAtley* v. *C. & O. Ry. Co.*, 201 Fed. 591; *McDuff* v. *Kurn*, (Ala.), 172 So. 886; *Smithson* v. *A. T. & S. F. Ry. Co.*, 174 Cal. 148, 162 Pac. 111, 113; *Crawford* v. *Davis* 136 S.

C. 95, 134 S. E. 247, 251; *Morris* v. *M. P. Ry. Co.*, 107 Neb. 788, 187 N. W. 130; 39 C. J. 266; Roberts, Federal Liability of Carriers, page 1545.

When the tests of negligence set out in the cases under the Federal Employers' Liability Act are applied to the facts in the present case, there is no sound legal or factual basis for the opinion of the Supreme Court of Missouri. Where the respondents knew that Stalac was accustomed to engage in rough and dangerous horseplay with other employees on the premises of the company, there was surely "Some probability of harm sufficiently serious that ordinary men would take precautions to avoid it", even though the chances of Osment being injured by Stalac in the specific manner at the particular time might not exceed the chances that he would not be so injured. Since negligence always has relation to what an ordinarily prudent man would do or omit to do under a given set of circumstances, it necessarily follows that the jury could find that an ordinarily prudent employer under the circumstances in evidence would not have permitted Stalac to run at large on its premises, thereby placing employees, including plaintiff, in a position where it might reasonably be anticipated harm would come to them or to him.

In view of the construction given the language of the Act by this Court, it is obvious that the duty and breach thereof claimed herein should form a basis of recovery under the Act. However, this Court has gone farther and specifically held that under the Act "The carriers owe a duty to their patrons *as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service.*" *Minn., etc. Ry. Co.* v. *Rock*, 279 U. S. 410, 49 S. Ct. 365.

The identical question herein involved was before the Supreme Court of West Virginia in *Griffin* v. *B. & O. R. Co.*, 96 W. Va. 302, 122 S. E. 912, an action under the Federal Employers' Liability Act. Plaintiff appealed from an order of the trial court sustaining a demurrer to the petition. It was alleged that plaintiff, a track man, was injured by a stone thrown by a co-employee; that such conduct was customary and that defendant acquiesced therein. It was defendant's contention that there could be no liability, because the stone was not thrown in the scope of the employment. The Court held that the defendant was not liable because of the negligence of a fellow servant of the plaintiff, *but because of the negligence of the company in placing the plaintiff in a position where it might reasonably be anticipated that harm would come to him by reason of dangerous practices permitted.*

The defendant sought to restrict the principle expounded by this Court in *Fletcher* v. *B. & O. Ry. Co.*, 168 U. S. 135, 18 S. Ct. 35, supra, to persons on streets or on adjacent private property injured by the conduct of an employee outside the scope of his employment and acquiesced in by the company. In answer to this, the West Virginia court said:

> "If the railroad company is liable to one on private property for its negligent acts, why would it not be liable to one lawfully and rightfully on its own premises, when injured by such act?"

It was likewise argued that this negligence was not that contemplated under the Federal Act, but the Court said, "Undoubtedly the plaintiff in this case comes within the scope of persons intended to be protected by the Act."

The Missouri Court has based its holding solely on *Davis* v. *Green*, 260 U. S. 349, 43 Sup. Ct. 123, and some

decisions by state courts. Since it is conceded in the opinion that the common law of Missouri would give plaintiff a right of recovery herein, recovery can only be denied because of a contrary holding on the same facts by this Court. In this case the only opinion which could be controlling would be that of *Davis* v. *Green*, *supra*.

We sincerely believe that the Missouri Court has misconstrued the opinion in *Davis* v. *Green*, 260 U. S. 349, 43 Sup. Ct. 123. A careful analysis of the state court opinion, as well as the opinion of the Supreme Court, is necessary to a clear understanding of the case. The action originated in one of the circuit courts in Mississippi and went on appeal to the Supreme Court of Mississippi where it is reported as *Hines* v. *Green*, 87 So. 649. The state court in its opinion took the position that there could be no recovery under the theory presented by the plaintiff unless the servant committing the assault *was engaged in the scope of his employment at the time* and the case in the State Supreme Court was decided on the theory that the assault was so committed, the Court holding, l. c. 652:

> "So far as the question as to whether the two men were engaged in the master's business, about the master's business, and whether the quarrel occurred and the killing resulted from this relation the evidence amply sustains the plaintiff's contentions as to liability on this feature of the case."

This was the only question considered and directly passed upon by the state court, except the question of assumption of risk. The only question then before this Court when the case came there on certiorari under the style of Davis vs. Green was whether the evidence supported the theory that both parties were engaged in the master's business at the time of the assault. There was no other question presented for the consideration of the

Supreme Court. Recovery was bottomed not on the conduct of the agents and the servants of the company *in retaining the man committing the assault, but upon the conduct of the man himself allegedly in the course of his master's business.* The only thing this Court decided was that the evidence did not sustain the holding of the state court that the killing was done in the course of employment. This Court *was not called upon in any way to pass upon the question of whether he had been negligently retained, regardless of whether the killing occurred in the course of the employment.*

In *Dewing* v. *N. Y. C. Ry. Co.*, 281 Mass. 351, 183 N. E. 754, plaintiff sued in two counts, the first at common law and the second under the Federal Employers' Liability Act. He waived the second count and the only holding the Court made was that since the evidence showed that plaintiff was under the Federal Employers' Liability Act, he could not recover at common law under the remaining count of his petition.

In *Bocian* v. *Union Pacific R. Co.*, 137 Nebr. 318, 289 S. W. 372, plaintiff's petition alleged that the assault causing his injuries was committed within the scope of employment of the man committing the assault. The case was ruled on a failure of the evidence to support the allegation that the assault was within the scope of employment. The same situation existed in *Jackson* v. *Chicago, etc., Ry. Co.*, 178 Fed. 432. The case of *Griffin* v. *B. & O. Ry. Co.*, 126 S. E. 571, was a second appeal in the case of *Griffin* v. *B. & O. Ry. Co.*, 122 S. E. 912, and supports plaintiff's theory of recovery herein.

II.

Negligence of Finnell.

Respondents considered it necessary to and did organize the Special Service Department and placed upon

it the duty of preserving order upon the premises, controlling the conduct of its servants, and protecting servants from unlawful violence and injuries. This department extended over its entire system. Its duties were not restricted to any one employee or any particular group of employees. Finnell, at the time of petitioner's injuries, was a patrolman in the Special Service Department engaged in the course of his duties. In performing them he was not restricted to employees under him, as is a foreman of a particular department, but had police power over all of the personnel of respondents' railroad (R. 13, 14, 17-19, 289, 290).

The evidence showed that when the seizure took place, Finnell was within two or three feet of the parties, knew Stalac's propensities, had warned him about them prior to the occasion in question, saw Stalac come directly up behind Osment although he had no business doing so and could have gone around him, saw him reach his arm around Osment's neck, place the hand on Osment's other shoulder for a better purchase and squeeze Osment's wind pipe or Adam's apple so that his air was cut off. (It was about 30 to 40 seconds from the time Osment was first gripped before he lost consciousness). When Osment became unconscious, Stalac released him and he went slowly to the floor on his knees and then fell over backwards, striking his head on the concrete floor (R. 21-27, 33, 36, 40-45, 49, 64, 68, 69, 46, 67, 91, 92, 94, 105, 106, 121). Finnell had the means, time and ability to first warn Osment, then to require Stalac to release his hold before Osment became unconscious, and to even later catch Osment before he struck his head, yet he did absolutely nothing. Respondents contend, and the Court held, that Finnell's failure to perform his duty under such circumstances imposed

no liability on respondents solely because Stalac was outside the scope of his employment under theory one.

Petitioner contends that, under the facts, respondents had a common law duty to control Stalac; that Finnell was one of the representatives charged with such duty, and also that his failure to act was negligence.

Recovery, under respondents' second theory, however, is not dependent upon the existence of the first theory, but they could be combined. Petitioner had a right to go to the jury on such theory even if the first theory, negligence in retaining and failing to control Stalac, were completely out of the case. Petitioner would have had a right of recovery under this theory even if there were no evidence of any prior conduct of Stalac or if such evidence were only in the case as bearing on Finnell's knowledge of what Stalac might likely do, and had no purpose in the case unless it would be to stimulate Finnell's reaction when Osment was seized. It is not based on a failure to have someone guard against what Stalac might likely do. It is based upon Finnell's failure to act in the performance of a duty considered necessary as to all employees and assumed by the master and directly enjoined upon Finnell.

The defendant, through the permanent Special Service Department represented by Finnell, had considered necessary and created and assumed a general continuing duty to its employees not based upon a specific occurrence such as dangers arising from a strike, and not based upon the danger created by a specific employee such as Stalac. This is further shown by the fact that Finnell and others in that department had actually remonstrated with Stalac and other employees about engaging in horseplay and had instructed them against it. It is a well established rule of law that a duty not owed

may be voluntarily assumed, but once having assumed a duty, failure to properly perform it is negligence.

It is said in Sherman and Redfield on Negligence, Vol. 1, Sec. 8:

> "A duty, not owed, may be voluntarily assumed. One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

In *Lambert* v. *Jones*, (Mo.), 98 S. W. (2d) 752, plaintiff sought to recover for failure to have light on a stairway. There was no common law duty to furnish light, yet it was shown that defendant assumed the lighting of the stairway. In passing on his failure to do so on the occasion in question, the Court said, l. c. 756:

> "By assuming this obligation, *which he apparently thought was necessary* when his dance hall was open to the public, *a duty was created* which he owed to the public to exercise ordinary care to keep his lights in good working order. *It was therefore his duty to see that they were turned on, at such times, so that the stairway would be lighted sufficiently to make it reasonably safe for the public to use it* on the occasions when he invited them to do so for the purpose of coming to his dance hall. *Failure to furnish sufficient light on such occasions would be negligence because such a failure would be 'an unperformed duty'* owing to his invitees." (Italics ours).

See also *Barber* v. *Kellogg*, 339 Mo. 677, 123 S. W. (2d) 100; *Frisco* v. *Mills*, 271 U. S. 344, 46 S. Ct. 520. A railroad company may assume a duty by rule or custom, and a violation thereof constitutes negligence under the federal act. *Washington T. Co.* v. *Callahan*, 276 F. 334; *Matthison* v. *Payne*, 98 N. J. Law 87, 118 Atl. 771; *Tapore* v. *Boston M. R. Co.*, 78 N. H. 536; *Brock* v. *Mobile R. Co.*, 336 Mo. 918, 51 S. W. (2d) 100, Cert Den. 53 S. Ct. 87, 287 U. S. 638.

The Missouri Supreme Court does not hold that there may not be liability for failure to perform a duty voluntarily assumed, but denied recovery under the second theory on the ground that since there could be no liability for the act of Stalac committed outside the scope of his employment, there could therefore be no duty to guard against it or prohibit it even though Finnell and respondents knew of Stalac's propensities. The holding necessarily means that a duty to prevent an injury arises only when the injury itself is one for which the defendant would be liable (R. 514-516). In other words, there could be no recovery for a failure to prevent the injury unless Stalac had assaulted or threatened to assault Osment in the course of Stalac's employment. This holding would seem to be absurd in the light of the settled decisions. If this be the law, then Finnell could have stood by watching other employees throwing stones at trainmen as they passed on cars and could have remained inactive until a trainman was hit and injured, and still subject the company to no liability.

Or assume that Stalac stood outside of the freight house and throwed stones through the window for 40 seconds and Finnell stood by watching and did nothing and finally a stone hit Osment.

Or assume that a disturbance arose and one man was down and another sat on top of him slowly choking him to death, could it be said that Finnell performed his duties by watching one man kill another and do nothing about it?

Assume that Stalac had come up to Osment with a gun and stood threatening to shoot him, could Finnell be said to have performed his duties if he stood by with a realization of what was going on and had the time and ability to prevent a shooting and yet did nothing?

Assume that a pole belonging to another company had fallen on one of respondents' employees and was slowly crushing him to death. Would Finnell have no duty to act solely because the falling of the pole in the first instance was not the fault of the railroad?

It is the settled law under the Federal Employers' Liability Act that where one is charged with certain duties, his employer cannot escape liability for his failure to perform, because the danger which such employee was charged with preventing was caused by the negligence or criminal act of a third party, *Thom* v. *N. Pac. R. R. Co.*, 190 Minn. 622, 252 N. W. 660; *Ross* v. *L. & N. R. Co.*, 178 Miss. 69, 172 So. 752.

In *Seaboard Airline Ry. Co.* v. *Latham*, 23 Ala. App. 490, 127 So. 679, a section hand cutting weeds along the right-of-way struck a wasp's nest and was attacked by wasps causing him to drop a scythe and injure himself. The evidence showed that his foreman knew of the presence of the wasp's nest, yet failed to warn him of it. The Court affirmed a recovery under the Federal Employers' Liability Act for the foreman's failure to warn.

It is obvious that the wasps were not acting for and on behalf of the defedant railroad in attacking the section hand and that the railroad would not have been liable for their conduct, yet a recovery was permitted because the foreman, like others, knew the dangerous propensities of wasps.

Under the federal act, liability attaches for a failure to prevent injury to one employee where another employee has a duty and sees the likelihood of injury, and has the time and ability to avoid it. *Simmons* v. *Louisiana Railroad Co.*, 149 La. 686, 90 So. 24, *Stool* v. *Southern Pacific*, 88 Ore. 350, 172 Pac. 101; *Newkirk* v. *Pryor*, (K. C. App.),

183 S. W. 682; *Evans* v. *Santa Fe,* 345 Mo. 147, 131 S. W. (2d) 604; *Jenkins* v. *Kurn,* 313 U. S. 256, 85 L. Ed. 851.

The cases cited by the Missouri court in support of its holding do not cover situations in any wise similar to the one at bar. In *C. & O. Ry. Co.* v. *Mihas,* 280 U. S. 102, 50 Sup. Ct. 42, plaintiff was injured in a movement of cars and this Court denied recovery because those engaged in the movement had no knowledge of his position or his movements and there was no custom or duty to warn before making a movement which inured to his benefit. The case of *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64, 48 Sup. Ct. 25, denied recovery to the administrator of one employee shot by another employee. The case was ruled on the basis that the shooting could not have been anticipated and that those present had no opportunity to prevent it and had actually warned the deceased not to get near the man who did the shooting. In *St. L. San Francisco R. Co.* v. *Mills,* 271 U. S. 344, 46 Sup. Ct. 520, the company voluntarily furnished the deceased a guard to escort him home during a strike. There was no evidence that the guard was negligent in the performance of his duty. This Court held that recovery could not be based on a failure to furnish more than one guard since the duty was only assumed to that extent and there was a total failure of evidence to show that additional guards would have prevented the killing.

The petitioner respectfully submits that the holding in the above entitled cause is contrary to the construction given the Federal Act by this Court and unduly restricts and narrows the benefits to be derived by employees under the Act, and is contrary to controlling legal principles announced by this Court, and is decided in a manner entirely different than this Court would decide it under the principles announced in its decisions.

WHEREFORE, petitioner respectfully urges that this Court grant a writ of certiorari to the Supreme Court of Missouri and review and reverse the holding and decision of that court.

Respectfully submitted,

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